

Internal Revenue Service

memorandum

CC:TL:TS WHEARD
TL-N-8478-89

date: OCT 18 1989

to: District Counsel, San Diego
Attn: Alice Harbutte

W:SD

from: Assistant District Counsel (Tax Litigation)

CC:TL

subject: [REDACTED], Docket No. [REDACTED]

This memorandum is in response to your request for tax litigation advice dated July 12, 1989, which was received by this office July 20, 1989.

ISSUES

1. Whether deficiency procedures apply to the assessment of partnership items which have converted to nonpartnership items pursuant to the execution of a settlement agreement under section 6231(b)(1)(C) prior to November 10, 1988 the date of enactment of a technical correction to I.R.C. § 6230(a)(2)(A)(ii).
2. What are the relevant statutes of limitations for partnership items which have converted to nonpartnership items?

CONCLUSIONS

1. Deficiency procedures may apply to partnership items which have converted to nonpartnership items by reason of a settlement agreement if the conversion occurred and a notice of deficiency was issued before November 10, 1988, the effective date of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), notwithstanding TAMRA's apparent retroactivity. Thus, motions for summary judgment or stipulated decision documents should be filed in such cases. Previously filed motions to dismiss for lack of jurisdiction should not be withdrawn, however, since the Court may find that it has no jurisdiction in any event.
2. If a settlement agreement was executed before the expiration of the statute of limitations for partnership items under section 6229(a), the settled partnership items will

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convert to nonpartnership items pursuant to section 6231(b)(1)(C) and the Service will have one year from the date of conversion to assess the converted items pursuant to section 6229(f). If a notice of deficiency is issued prior to the expiration of this one year period, section 6503(a) will suspend the period for assessment during the pendency of the deficiency proceeding and for 60 days thereafter.

FACTS

On [REDACTED], the taxpayers executed a closing agreement with respect to their investment in [REDACTED], a TEFRA partnership for the taxable years [REDACTED] and [REDACTED]. The agreement was executed on behalf of the Service on [REDACTED]. Notices of deficiency were issued for the settled items for the [REDACTED] and [REDACTED] taxable years on [REDACTED] and [REDACTED] respectively. The notices were timely petitioned on [REDACTED]. On [REDACTED], the Service filed a motion to dismiss for lack of jurisdiction based on the TAMRA technical correction to section 6230(a)(2)(A)(ii) which makes deficiency procedures inapplicable to items which have converted to nonpartnership items by reason of a settlement under section 6231(b)(1)(C).

The taxpayers have opposed the motion, stating that the case should be dismissed on the separate ground that the statute of limitations under section 6501 has expired.

DISCUSSION

Section 6231(b)(1)(C) provides:

(b) Items Cease To Be Partnership Items in Certain Cases.-

(1) In general.-For purposes of this subchapter, the partnership items of a partner for a partnership taxable year shall become nonpartnership items as of the date-

. . .
(C) the Secretary enters into a settlement agreement with the partner with respect to such items, . . .

Section 6230(a) provides as relevant here:

(a) Coordination With Deficiency Proceedings.-

(1) In general.-Except as provided in paragraph (2), subchapter B of this chapter shall not apply to the assessment or collection of any computational adjustment.

. . .

(2) Deficiency proceedings to apply in certain cases.-

(A) Subchapter B shall apply to any deficiency attributable to-

(ii) items which have become nonpartnership items (other than by reason of section 6231(b)(1)(C)) and are described in section 6231(e)(1)(B). (emphasis supplied)

The underlined phrase in parenthesis was added on November 10, 1988, by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) as a technical correction. Section 1018(o) of P.L. 100-104. The technical correction is effective retroactively to September 3, 1982.^{1/}

The above technical correction raises questions as to the validity of notices of deficiency issued before the date of the technical correction. Since such notices were specifically authorized by statute prior to November 10, 1988, they were valid at the time they were issued. It appears that the technical correction enacted by TAMRA removed application of deficiency

^{1/} The underlined language inserted into I.R.C. § 6230(a)(2)(A)(ii) is effective "as if included in the provision of the [Tax] Reform Act [of 1986] to which such amendment relates." Technical and Miscellaneous Revenue Act of 1988, 26 U.S.C. 1 (1988); P.L. 100-647, § 1019, 102 Stat. 3593 (1988).

Section 6230(a)(2)(A)(ii) was added by section 1875(d)(2)(A) of Public Law 99-514 of the Tax Reform Act of 1986 effective retroactively to September 3, 1982. 26 U.S.C. 6221 (1986); P.L. 99-514, § 1881; P.L. 97-248 §§ 407(a)(1) and (3).

procedures and thus may also have retroactively removed jurisdiction of the courts over items converted to nonpartnership items pursuant to settlement. On the other hand, since notices issued before November 10, 1988, were authorized at the time they were issued, petitions filed with respect to such notices may have validly conferred jurisdiction on the courts to adjudicate those issues to conclusion notwithstanding the apparent unrestricted retroactivity of the amendment.

Since a determination as to jurisdiction may go either way, we have authorized stipulated decision documents or motions for summary judgment for such petitions filed with respect to notices issued before the effective date of TAMRA. This decision was made in part because section 6503(a) suspends the period for assessment under section 6229(f) when a notice of deficiency is issued "with respect to a deficiency described in section 6230(a)(2)(A)" (see discussion infra).

A deficiency "described in section 6230(a)(2)(A)" included deficiencies attributable to settled items before the TAMRA correction. Since items converted to nonpartnership items through a settlement are retroactively (arguably) not subject to deficiency procedures pursuant to the TAMRA correction to section 6230(a)(2)(A), the suspension provision of section 6503(a) may be retroactively inapplicable. Thus, the TAMRA correction may have statutorily created a blown statute where one would not have existed before the correction.

We do not think that Congress intended this result. We have taken the position that a petition filed with respect to a notice of deficiency issued before the date of enactment of TAMRA is, with respect to a deficiency described in section 6230(a)(2)(A), within the meaning of the suspension provision of section 6503(a). Thus, a notice of deficiency issued before November 10, 1988, will effectively suspend the statute of limitations and allow a petition to be filed by a taxpayer. In conformity with this position, motions for summary judgment or stipulated decision documents should be filed in such cases based on the settlement agreement.

In the instant case, a motion to dismiss for lack of jurisdiction was filed based on the allegation that section 6230(a)(2)(A)(ii) only authorizes a notice of deficiency to be issued with respect to items which have become nonpartnership items other than by reason of section 6231(b)(1)(C). Although this action is contrary to our present position, the Court may in fact find that it lacks jurisdiction even if we withdraw our motion to dismiss and substitute a motion for summary judgment based on the settlement agreement. Rather than create this awkward situation, where motions to dismiss have been already filed, they should not be withdrawn.

Whichever way the Court goes on the jurisdictional issue, however, the statute of limitations may not have expired as discussed below.

STATUTE OF LIMITATIONS:

Section 6229(a) provides for a three year statute of limitations applicable to partnership items. The statute runs from the later of the due date of the partnership return or the date the partnership return is actually filed. Section 6229(d) suspends the above statute when a notice of FPAA has been issued to the tax matters partner. Section 6229(f) provides as follows:

(f) **Items Becoming Nonpartnership Items.**-If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for a partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. . . .

Thus, if the closing agreement in your case was executed before the expiration of the statute of limitations under section 6229(a) including any suspension period thereunder, the Service would have one year from the date of execution of the closing agreement by the Service to issue a notice of deficiency or assess the deficiency as a computational adjustment. Thus, in your factual scenario, whether section 6501 also applies is irrelevant.^{2/}

^{2/} As a general matter it is our position that only section 6229(f) applies to converted partnership items. Only in especially egregious circumstances are we willing to argue that the Service would have the longer of the statutes of limitations for nonpartnership items under section 6501(a) and the period for assessing converted items under section 6229(f). Such a circumstance might be where a closing agreement covers future years and the return for those years will not be due until more than one year after the settlement agreement is executed. These issues will be addressed in a future Litigation Guideline Memorandum. In the instant case we would not disagree with the taxpayer that section 6501 applies, only that its application is

If a notice of deficiency is issued, the statute of limitations under section 6229(f) will be suspended pursuant to section 6503(a) as follows:

(a) Issuance of Statutory Notice of Deficiency.-

(1) General rule.--The running of the period of limitations provided in section 6501 or 6502 (or section 6229, but only with respect to a deficiency described in section 6230(a)(2)(A)) on the making of assessments . . . in respect of any deficiency as defined in section 6211 . . . shall . . . be suspended for the period during which the Secretary is prohibited from making he assessment . . . and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final . . . and for 60 days thereafter. (emphasis supplied)

The underlined portions of the above statute indicates the period for assessment under section 6229(f) may be suspended even if it is later determined that the Court does not have jurisdiction over the deficiency proceeding. This is because "in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court" the statute of limitations under section 6229(f) may be suspended. It is unclear, however, whether "the deficiency" referred to following the "in any event" language refers solely to "any deficiency as defined in section 6211" and whether this language would subsume the limiting language relating to section 6230(a)(2)(A).

It is our position that Congress did not intend to retroactively create blown statutes by enacting the technical correction to section 6230(a)(2)(A). Furthermore, the "in any event" language indicates a general intent by Congress that a statute of limitations should not expire during the period that the Court is deciding whether it has jurisdiction over a case. See United States v. Shahadi, 340 F.2d 56, 58 (3rd Cir. 1965) (discussing legislative history for the "in any event" language). Thus, even if the Court should find that it does not have jurisdiction over a deficiency attributable to partnership items which have converted to nonpartnership items by reason of a settlement, the statute of limitations will have been suspended

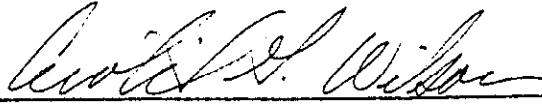
irrelevant in the circumstances of this case because section 6229(f) expressly applies.

pursuant to section 6503(a) and pursuant to section 6230(a) the Service may assess the deficiency as a computational adjustment reflecting the terms of the settlement.

Please refer any questions regarding this matter to Bill Heard at FTS 566-3289.

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